

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

Scripps Howard
Broadcasting CompanyFor Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

Four Jacks Broadcasting, Inc.

For Construction Permit for a
New Television Facility on
Channel 2 at Baltimore,
MarylandMM Docket No. 93-94

File No. BRCT-910603KX

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. BPCT-910903KE

To: The Honorable Richard L. Sippel
Administrative Law JudgeCONSOLIDATED REPLY TO OPPOSITIONS TO
REQUEST TO CERTIFY APPLICATION FOR REVIEW

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys, hereby submits this Consolidated Reply to the Opposition to Request for Certification of Scripps Howard Broadcasting Company ("Scripps") and the Mass Media Bureau's Opposition to Request to Certify Application for Review, both filed on April 19, 1993. As set forth below, both of these Oppositions are based on unsupported surmise and overblown interpretations of the Commission's brief statements with respect

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to allegations of anticompetitiveness against Scripps-affiliated companies.^{1/}

1. Four Jacks has requested the Presiding Judge to certify to the full Commission an application for review of the Hearing Designation Order ("HDO") in this case. Such an application for review would challenge the HDO's failure to add an issue to determine the impact of findings and allegations of anticompetitive conduct by the Scripps-owned cable franchisee in Sacramento, California, Sacramento Cable Television ("SCT"), on Scripps' qualifications to remain the licensee of WMAR-TV. With its Request to Certify, Four Jacks provided a copy of a July 27, 1992 Mass Media Bureau letter dismissing a petition to deny filed by Pacific West Cable Television ("PacWest") against the license renewal applications of Scripps' Portland, Oregon radio stations.

one involving WMAR-TV. Accordingly, the HDO should have designated issues to explore the misconduct of Scripps' Sacramento cable subsidiary, as well as Scripps' apparent misrepresentation of facts in its renewal application.

3. Scripps and, surprisingly, the Bureau itself oppose Four Jacks' request for certification. Neither of their oppositions has any merit.

4. First, it is necessary to dispel the notion that since SCT was not a named party in the PacWest case, the jury finding concerning its misconduct is noncognizable before the Commission. For purposes of the Commission's character qualifications with respect to non-FCC misconduct, the question is whether the pertinent entity has been adjudicated by a competent agency or court to have engaged in such misconduct. See Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1205 (1986), recon. denied, 1 FCC Rcd 421 (1986). Furthermore, the broadcast license renewal application asks whether "an adverse finding [has] been made or final action been taken by any court or administrative body with respect to the [renewal] applicant or parties to the application." Neither the character qualifications policy nor the renewal application asks merely whether the entity in question was named in the caption of the non-FCC proceeding.

5. Nor is there any basis for Scripps' assertion that the PacWest special jury verdicts "deal solely with conduct by the defendants [the City and County of Sacramento]. They do not

purport to hold that any Scripps related company behaved in an anti-competitive manner." Scripps Opposition at 2. In PacWest Special Verdict No. 12(d), which Scripps cites in its Opposition, the jury expressly found that the Sacramento cable franchising process was

a sham used by defendants to promote the making of cash payments and provision of "in kind" services by the company ultimately selected to provide cable television

held (erroneously, as discussed above) that Scripps was not required to report the PacWest decision because it was not a party, and additionally, that Scripps was not required to report a related lawsuit filed against it by Weststar Communications because that case had not been adjudicated.

7. As to the Bureau's March 4, 1988 letter concerning Scripps' renewal applications for stations WXYZ-TV, WEWS(TV), WCPO-TV and KHSB-TV (Scripps Opposition, Ex. B), and its February 22, 1991 letter concerning the application for Scripps' acquisition of WMAR-TV (id., Ex. C), both of these letters were one-page actions granting voluntary requests to withdraw petitions against the applications. The only "ruling" in these letters on Scripps' licensee qualifications was virtually identical stock language stating that "we have fully considered the matters set forth in [the withdrawn pleadings] and conclude that there are no substantial and material questions of fact that would warrant any further inquiry." And, of course, the Bureau's letter concerning the renewal applications of Portland radio stations KUPL(AM) and KUPL-FM stated that the PacWest allegations "will be resolved in the context of the WMAR-TV proceeding."

8. In short, there is no indication that the Commission has ever meaningfully examined the impact of the anticompetitive conduct by Scripps' Sacramento cable subsidiary on Scripps' qualifications to be a broadcast licensee. No hearing (paper or otherwise) has been held, no written analysis has been delivered, and no reasoned legal conclusions have been reached. To the

extent the Commission has purported to address the matter at all, it has been through boilerplate recitations in the course of granting voluntary requests to terminate the litigation. Given the Commission's vital concern with anticompetitive activity by its licensees, see NBC v. U.S., 319 U.S. 190, 222-24 (1943) -- and in light of the Bureau's July 1992 pledge to resolve the matter in the WMAR-TV proceeding -- the public interest demands a substantive exploration of the Sacramento allegations and jury findings in this case.

9. The Mass Media Bureau makes the stunning assertion that its own letter of July 1992 concerning the Portland, Oregon renewals does not mean what it says. According to the Bureau, the July 1992 letter's reference to "the WMAR-TV proceeding" was intended to refer to PacWest's petition for reconsideration of the application seeking the assignment of WMAR-TV to Scripps -- a

10. The Bureau's explanation is simply untenable. The Bureau is asking the Presiding Judge to believe that one part of the Bureau did not know of another part's year-and-a-half-old actions. Such a contention defies belief in and of itself, and in any event, the Bureau's dubious post-hoc explanation cannot be utilized to eviscerate the plain language of the Bureau's July 1992 letter. Nor is it "bizarre" that the Bureau would direct that the Sacramento matter be resolved in this proceeding, as Scripps claims. The Sacramento allegations and findings implicate all of the Scripps stations, not just the Portland radio stations. On July 27, 1992, when it issued the Portland letter, the Bureau knew (or should have known) that the mutually exclusive Four Jacks application was on file, and that a full comparative hearing was forthcoming. It was entirely logical, therefore, for the Bureau to have the Sacramento facts explored in this television proceeding, which by its nature would afford the fullest opportunity for inquiry. In sum, the plain language of the Bureau's July 1992 letter should be obeyed, and issues added to determine the impact of the Sacramento allegations and findings on Scripps' licensee qualifications.

Conclusion

Both Scripps and the Bureau have attempted to obscure the facts, the law, and the Commission's prior "rulings" concerning the conduct of Scripps' Sacramento cable subsidiary. Their efforts, however, cannot obscure the simple truth -- the

Commission has never meaningfully resolved this matter, and has specifically directed that the resolution occur in this proceeding. The HDO's failure to provide for such a resolution was plain error, and accordingly, Four Jacks' request for certification should be granted.

Respectfully submitted,

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Dated: April 23, 1993

CERTIFICATE OF SERVICE

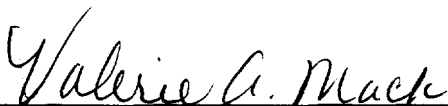
I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "CONSOLIDATED REPLY TO OPPOSITIONS TO REQUEST TO CERTIFY APPLICATION FOR REVIEW" were sent this 23rd day of April, 1993, by first class United States mail, postage prepaid, to the following:

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